

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES EDWARD WALTON

V.

BEN VARNER, et al.

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CIVIL ACTION

NO. 00-CV-4593

ORDER

AND NOW, this 19th day of November, 2001, upon careful and independent consideration of the petitioner's Petition for Writ of Habeas Corpus, and after review of the Report and Recommendation of the United States Magistrate Judge, as well as the petitioner's objections thereto, it is hereby ORDERED and DECREED that:

- (1) the Petition for Writ of Habeas Corpus is DENIED and DISMISSED without an evidentiary hearing; and
- (2) there is no probable cause to issue a certificate of appealability.

The Court adopts the Magistrate Judge's Report and Recommendation ("R & R") in its entirety, except for the

discussion of the petitioner's claim that his counsel was ineffective for failing to object to the trial court's jury instructions on reasonable doubt, which is found at pages 20-22 of the R & R.

The petitioner argues that his counsel was ineffective for **failing** to object to the following portion of the reasonable doubt instruction:

"To summarize, you may not find either defendant guilty upon a mere suspicion of guilt. The Commonwealth has the burden of proving the defendant guilty beyond a reasonable doubt."

Commonwealth v. Walton, No. 622 MDA 99 at 3 (Pa. Super. filed Dec. 12, 1999). The test for ineffective assistance of counsel is (1) whether the attorney's performance "fell below an objective standard of reasonableness" and (2) whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different."
Strickland v. Washinston, 466 U.S. 668, 688, **694 (1984)**.

The Magistrate Judge rejected the petitioner's ineffective assistance claim on the grounds that he failed to meet the second prong of the Strickland test. However, a flawed reasonable doubt instruction is one of a limited class of errors which is **considered structural**. See Neder v. United States, 527 U.S. 1, 8 (1999); Sullivan v. Louisiana, 508 U.S. 275, 281 (1993). A

misdescription of the burden of proof "vitiates all the jury's findings," and always invalidates a conviction. Sullivan, 508 U.S. at 280-281. It follows from this that the prejudice prong of the Strickland ineffective assistance test is met whenever counsel fails to object to a flawed reasonable doubt instruction.

This means that the Pennsylvania Superior Court's analysis and conclusions regarding the reasonable doubt instruction must be evaluated to determine if they are "contrary to, or involv(e) an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). The Superior Court found that there was no merit to the petitioner's challenge to the reasonable doubt instruction, and that his counsel was therefore not ineffective for failing to object to it.

The Superior Court did not address the two sentences that the petitioner challenges in isolation. It looked to the instruction as a whole and found that the concept of reasonable doubt was explained extensively, and that the reference to suspicion of guilt did not function to dilute that explanation. See Super. Ct. Op. at 4 (citing Commonwealth v. Murphy, 559 Pa. 71, 82, 739 A.2d 141, 147 (1999)).

The defendant argues that the challenged language "purports to summarize the entire concept of the burden of proof and it

simply does not do that.'" Petitioner's Objections at 8. He states that: "Instead of cautioning the jury not to convict on the basis of 'mere suspicion' the trial court should have been cautioning them not to convict on a preponderance of the evidence, on the probability of guilt, or even on clear and convincing evidence which does not meet the beyond a reasonable doubt standard." Id. at 9. However, the instruction does not say that the jury can find the defendant guilty as long as it has more than a mere suspicion of guilt. The instruction makes it clear that the standard is beyond a reasonable doubt, which it defines **over** the course of several sentences, and it does not equate the phrase "beyond a reasonable doubt" with the phrase "anything more than a mere suspicion."

The Superior Court's determination that the reasonable doubt charge was adequate was not contrary to, and did not involve an unreasonable application of, federal law. Federal law, like Pennsylvania law, provides that courts should look to instructions as a whole to determine if they "'correctly convey the concept of reasonable doubt to the jury.'" Victor v. Nebraska, 511 U.S. 1, 5 (1994). The Superior Court's determination that the reasonable doubt instruction **was** adequate was therefore in accord with federal law, as was its conclusion that counsel was not ineffective for failing to challenge the

instruction.

The petitioner's objections to the R & R raise one additional issue which this Court will address briefly. In his habeas petition, the petitioner challenged his attorney's failure to call witnesses on his behalf, without specifying the witnesses to whom he was referring. The Magistrate Judge assumed that the petitioner was referring to two witnesses, Terry Behmer and Paul Girvin; in his objections, the petitioner clarifies that he was challenging his counsel's failure to call his paramour, Toni Smith. See R & R at 17-18; Objections at 20-21.

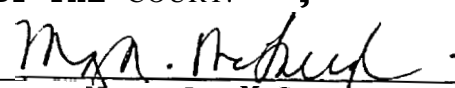
In the Report and Recommendation, the Magistrate first finds that the petitioner's ineffectiveness claim fails because he did not identify possible witnesses or describe what they would have said. See R & R at 17. This finding still applies, because although the petitioner identifies Toni Smith in his objections, he does not describe what she would have said. The Magistrate Judge's analysis of the merits of the petitioner's claim also applies to Toni Smith.

The Superior Court found that the petitioner's claim that his counsel was ineffective for not calling Ms. Smith was not a basis for relief because it had been previously litigated. The Court went on to find that the petitioner's claim was "specious," because he: "fail[ed] to even assert how her testimony could have

been material to his defense" and because "she was a codefendant in [the petitioner's] trial and had asserted her Fifth Amendment right to remain silent." Super. Ct Op. at 9. The Superior Court's findings regarding Ms. Smith are not contrary to, and do not involve an unreasonable application of, federal law, for the reasons given in the R & R with regard to the testimony of Mr. Behmer and Mr. Girvin. See R & R at 19-20.

The Petition for a Writ of Habeas Corpus is denied for all of the above reasons.

BY THE COURT:



Mary A. McLaughlin, J.